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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 543 F. 2d 18. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on February 2, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person charged with perjury before a grand jury may defend by arguing that truthful answers would not have shown that a substantive crime had been committed.

STATEMENT

On September 19, 1973, petitioner appeared voluntarily before a federal grand jury in the Northern District of Illinois. The grand jury was investigating possible violations of the Hobbs Act (18 U.S.C. 1951) and "other federal criminal statutes" (Pet. App. D1). In the course of its inquiry, the grand jury sought information concerning extortion of service station dealers by organizers for Local No. 705 of the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union (the "Union") (Pet. App. D1).

Petitioner is a Union organizer. An Assistant United States Attorney told petitioner that he was a possible subject of the investigation and that he "could be named as a defendant in an indictment arising out of this investigation." He also told petitioner that giving false answers is a crime. Petitioner stated that he understood the warnings (G.J. Tr. 3-4).[1]

Counsel asked petitioner whether, in December 1967, he had entered Rex Jones's gas station armed with a revolver and told Jones: "Everybody on the street is in the Union and you are going to be whether you like it or not." Petitioner denied that such an incident had occurred (Pet. App. D2-D3). The government attorney also asked petitioner whether he had entered a gas station belonging to Robert Marshall, placed two Union contracts on the table, displayed two guns in his belt, and said: "What's it going to be?" Petitioner again denied that such an episode had taken place; he stated that he never carried a gun into a gas station (Pet. App. D3-D4).

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[1]Petitioner was also advised that he need not answer incriminating questions, that his answers could be used against him, and that he could consult with an attorney before answering any question (G.J. Tr. 4-6).

Petitioner was indicted for making false declarations to a grand jury, in violation of 18 U.S.C. 1623. The district court dismissed the indictment (Pet. App. A1-A3), holding that the allegedly false testimony was not material to any inquiry within the authority of the grand jury. The court reasoned that the allegedly extortionate methods used by petitioner were employed for a legitimate union objective (*i.e.*, to become the exclusive bargaining agent), and that, consequently, "no lawful indictment for Hobbs Act violations could have issued" (Pet. App. A3) in light of *United States* v. *Enmons*, 410 U.S. 396.

The court of appeals reversed (Pet. App. B1-B7). It held that the grand jury investigation was "broad enough to encompass conduct outside the pursuit of legitimate labor ends, [such as] * * * [e]xtortion of personal payoffs or other illegitimate benefits [which] would not be protected by *Enmons*" (Pet. App. B5). It concluded that "[t]he mere possibility that the grand jury would not find conduct indictable in light of *Enmons* would not deprive it of authority to investigate to see whether indictable offenses had been committed" (*ibid.*). Judge Hastings dissented, primarily for the reasons stated by the district court (Pet. App. B6-B7).

ARGUMENT

Petitioner contends that this case presents important issues concerning the meaning of the Hobbs Act. It does not. Petitioner's presentation rests upon a fundamental misconception of the grand jury's "wide latitude to inquire into violations of criminal law." *United States* v. *Calandra*, 414 U.S. 338, 343. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702. Indeed, the "Grand Jury * * * can investigate

merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Bisceglia*, 420 U.S. 141, 148, quoting from *United States* v. *Powell*, 379 U.S. 48, 57.

A grand jury is entitled to hunt for clues. It is entitled to ask questions that will show that a crime did *not* occur. This grand jury was investigating not only Hobbs Act offenses, but also crimes in violation of "other federal criminal statutes," as petitioner was admonished in the grand jury room (G.J. Tr. 3). Even if the questions concerning petitioner's alleged threats could not have illuminated conduct indictable under the Hobbs Act, they might have shed light on violations of other laws—concerning, for example, firearms or conspiracy. " 'When the grand jury is performing its investigatory function into a general problem area * * * society's interest is best served by a thorough and intensive investigation' " (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701, quoting from *Wood* v. *Georgia*, 370 U.S. 375, 392).

A question is "material" as long as it will further the grand jury's investigation, and the questions asked of petitioner were material under this standard. Truthful answers might have absolved petitioner (and others) of criminal responsibility, thus helping the grand jury to perform its historic function of shielding persons from unwarranted charges. Or, perhaps, truthful answers might have led to other questions and answers that would have disclosed that petitioner or others extorted money for personal rather than Union uses. It is hard to say where the inquiries might have led; petitioner forestalled those inquiries by denying the grand jury the one thing to which it was indisputably entitled—the truth. Cf. *United States* v. *Mandujano*, 425 U.S. 564, 577. Petitioner nipped the grand jury's investigation in the bud, and he is in no position to benefit by the argument that, if he had told the truth, the grand jury could not have returned a valid indictment charging him

with violations of the Hobbs Act. As the court of appeals explained (Pet. App. B5), "[t]he mere possibility that the grand jury would not find conduct indictable in the light of *Enmons* would not deprive it of authority to investigate to see whether indictable offenses had been committed."

Beyond this, petitioner misreads *Enmons*. That case does not exempt from Hobbs Act prosecution all threats by a union official against an employer. Where, as in this case, the Union does not represent the employees[2] and there is no collective-bargaining dispute to which any Union member is a party, the Hobbs Act prohibits extortion. Threats of the kind at issue here are quite unlike those at issue in *Enmons*, where a union threatened violence to induce an employer to meet its wage demands in the context of an established collective bargaining relationship (410 U.S. at 399). A demand that employees bargain through the Union and pay dues to it regardless of their wishes simply cannot be characterized as a "legitimate collective-bargaining demand" (*ibid.*); it was neither legitimate nor undertaken to achive a goal sought in the collective bargaining process.[3] The Hobbs Act prohibits extortion for such an end.[4]

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[2]Petitioner apparently concedes that the Union did not represent the employees at the Jones and Marshall dealerships (Pet. 10-12), although one employee at each station eventually became a Union member (Pet. 11-12 n. 2).

[3]Petitioner's "organizing" activities were the subject of an investigation by the National Labor Relations Board. An administrative law judge found that the Union employed threats and "strong-arm" tactics to become the exclusive representative of employees at the Jones and Marshall service stations, even though the employees at Jones's business refused to join. The judge concluded that these activities constituted "sheer racketeering" (Pet. 5).

[4]Petitioner extravagantly characterizes the court of appeals' holding as one that "*all* violence occurring during the process of organizing violates the Hobbs Act" (Pet. 11). This and other characterizations

Even if petitioner's alleged threats could be characterized as furthering a "legitimate collective-bargaining demand," however, the questions asked by the grand jury here would still have been within its authority. A labor tactic not otherwise illegal under the Hobbs Act may become so if associated with an illegitimate objective, such as a payoff for the union representative. *United States* v. *Quinn*, 514 F. 2d 1250 (C.A. 5), certiorari denied, 424 U.S. 955. There was at least a possibility that petitioner was seeking payoffs, using threats to create a climate of intimidation in which the victims would pay him money to prevent being harmed or harassed. Such activities are Hobbs Act offenses under the express language of *Enmons, supra*, 410 U.S. at 400. Petitioner's alleged perjury may have prevented the grand jury from investigating this possibility, which the grand jury was entitled to explore by inquiring into the methods used in petitioner's "negotiations."[5]

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overlook the fact that this is a perjury case, not a substantive Hobbs Act case. Any language of the court of appeals beyond what was necessary to conclude that petitioner's statements were material to a legitimate investigation is *dicta*. In any event, we cannot find within the court's opinion the views on the Hobbs Act petitioner attributes to it.

[5]In any event, petitioner's arguments are premature. The court of appeals' reinstatement of the indictment puts petitioner in the position he would have occupied if the district court had denied his motion to dismiss. Such a ruling would not have been subject to interlocutory appeal (*Parr* v. *United States*, 351 U.S. 513). Petitioner may be acquitted at trial, in which case his claim will be moot. If, on the other hand, petitioner is convicted and the conviction is affirmed, he will then be able to present this claim, as well as any others that may arise during the trial, to this Court in a petition for certiorari to review the final judgment. *American Foreign S.S. Co.* v. *Matise*, 423 U.S. 150, 155; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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